In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-470

THOMAS THORNBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that he was deprived of a fair trial because the trial court refused to give a special instruction concerning the burden of proof when a defendant attempts to establish an alibi and because of the inability of one or more members of the jury to understand English.

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner and co-defendant Roger Alluis[1] were convicted of conspiring to import, of importing and of conspiring to possess a controlled substance (marijuana), in violation of 21 U.S.C. 960, 952(a)(2) and 846. Petitioner was sentenced to five years' imprisonment on count one, to be followed by two concurrent terms of three years' imprisonment on counts two and three, and by three concurrent terms of two years' special parole. The

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[1]The petition filed by co-defendant Alluis (No. 75-5311) was denied on November 11, 1975.

court of appeals affirmed, but vacated the sentences imposed on the two conspiracy counts and remanded for resentencing upon one of them and for dismissal of the other (Pet. App.).

The government's evidence, as outlined in the opinion of the court of appeals (Pet. App. 2-14), established the existence of a conspiracy to ship marijuana by speedboat from St. Martin in the French West Indies to Puerto Rico. One of the co-conspirators, Marcell Daniel Eme, pleaded guilty and testified at trial against petitioner and Alluis. Eme identified petitioner and Alluis as participants in the scheme to smuggle marijuana into Puerto Rico, and he described a series of meetings and trips in furtherance of the scheme (7 Tr. 1-54; 8 Tr. 2-42). Both petitioner and Alluis attempted to establish an alibi by testifying that during the 2 1/2 week period in question they were engaged in a search for a lost boat belonging to Thornburg (12 Tr. 100-194; 14 Tr. 44-72; 15 Tr. 1-10).

1. Petitioner contends that the trial court erred in refusing to give a special instruction concerning the burden of proof when a defendant attempts to establish an alibi. He argues that a special alibi instruction should have been given in the present case, despite the fact that the court instructed the jury several times that the burden of proof is always on the prosecution and that the defendant in a criminal case never has a burden or duty to produce evidence.

While one circuit has held that a defendant is entitled to an alibi instruction upon request, regardless of the adequacy of general instructions concerning the burden of proof (see *United States* v. *Booz*, 451 F.2d 719, 722-723 (C.A. 3)), the other circuits that have considered the issue, like the

court below, have refused to adopt a general rule.[2] We do not believe that a fixed and inflexible rule concerning the giving of a special alibi instruction is required by due process, although a court may of course decide to promulgate such a rule in the exercise of its supervisory powers. Neither do we believe that this is a matter meriting review by this Court, and the promulgation of a uniform national rule. On the facts of this case, moreover, we submit that the trial court properly refused to give a special alibi instruction. As the court of appeals stated (Pet. App. 27):

> We do not say, of course, that there may not be special occasions where such an instruction should be given. Here, however, while the facts were complicated, the issues were not, and we see no likelihood that the jury mistook the standard of proof. The court doubtless refused the charge in order to avoid complicating its instructions, which were accurate, lucid and complete.

2. During its deliberations, the jury sent several messages to the court in Spanish which the court answered in Spanish. On the basis of these communications, petitioner's counsel, retained subsequent to the decision by the court of appeals, reviewed the questionnaires that had been completed by the jurors to determine whether any members of the jury might have experienced language problems (Pet. App. C). The questionnaire completed by

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[2]See *Guthrie* v. *United States*, 207 F.2d 19 (C.A. D.C.); *United States* v. *Erlenbaugh*, 452 F.2d 967 (C.A. 7), affirmed, 409 U.S. 239.

Contrary to petitioner's contention, the holding in the present case does not conflict with decisions of the Eighth Circuit. The Eighth Circuit's decisions in *Johnson* v. *Bennett*, 414 F.2d 50, and *Stump* v. *Bennett*, 398 F.2d 111, certiorari denied, 393 U.S. 1001, relied upon by petitioner, instead invalidated the practice of requiring a defendant to prove his alibi by a preponderance of the evidence.

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juror Carmen Rivera Flores indicates that she had been disqualified from jury service in 1971 due to insufficient knowledge of English. On a questionnaire completed in 1969, juror Tomas Rivera Santiago had stated that he could read, write, speak and understand the English language "a little—not to [sic] much." Juror Maria Camacho Ramos had stated in a 1970 questionnaire that she could read, write, speak, and understand English "a little bit" (Pet. App. D).

Petitioner contends, on the basis of these questionnaires, that he was deprived of a fair trial. Petitioner did not raise this issue in either the trial court or in the court of appeals, and normally should not be permitted to raise the issue for the first time in this Court. *Tacom* v. *Georgia*, 410 U.S. 351, 352; *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

In view of the importance of the issue and of the difficulty of dealing with it on the basis of the present record, however, the Court might deem it appropriate to remand petitioner's case to the United States District Court for the District of Puerto Rico for a hearing limited to ascertaining whether any members of the jury experienced difficulty understanding the proceedings because they were conducted in English. Alternatively, the Court might appropriately deny the petition, leaving petitioner with the option of raising the issue in a collateral attack on his conviction under 28 U.S.C. 2255.[3]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[3]Since co-defendant Alluis' petition has been denied (see n. 1, *supra*), the only course available to him to raise the issue is a proceeding under Section 2255.